SM-50 COMPETENCY TO PROCEED

The following Special Material outlines the procedures relating to a criminal defendant's competency to proceed as those procedures are set forth in sections 971.13 and 971.14, Wisconsin Statutes. The material takes into account the changes in those statutes made by legislation through the end of the 2019-2020 legislative session.

CONTENTS

I. The Legal Standard for Incompetency

Section 971.13(1) provides: "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." (Emphasis added.)

A. "Lacks substantial mental capacity"

The phrase "lacks substantial mental capacity" replaced the former statute's "as a result of mental disease or defect is unable. . ." Thus, there is no need to identify a particular mental disease as the source of the alleged difficulty. The co reporters for the Judicial Council committee that drafted the current competency statutes state:

> Not every defendant with a clinically recognized mental disorder is incompetent to stand trial. The legal standard is whether the defendant has the present mental capacity to understand the proceedings and assist in his or her own defense. The new legislation does not change this standard. It does clarify, however, that a defendant should not be considered incompetent to proceed merely because he or she requires medication to maintain legal competency.

Fosdal and Fullin, "Wisconsin's New Competency to Stand Trial Statute," Wisconsin Bar Bulletin (Oct. 1982) p. 11.

The term "lacks substantial mental capacity" can include mental retardation as the basis for an incompetency finding. In State v. Garfoot, 207 Wis.2d 215, 227-28, the Wisconsin Supreme Court made the following comments in connection with a suggestion noted in the state's argument that mental retardation alone may not warrant a finding that the defendant is not competent to stand trial:

> The State is correct in that mental retardation in and of itself is generally insufficient to give rise to a finding of incompetence to stand trial. However a defendant may be incompetent based on retardation alone if the condition is so severe as to render him incapable of functioning in critical areas.

B. "To understand the proceedings or to assist in his or her own defense"

This part of the standard has been part of Wisconsin law since 1965. The constitutional standard was stated as follows in Dusky v. United States, 362 U.S. 402 (per curiam, 1960): ". . . the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as a factual understanding of the proceedings against him." The Wisconsin Supreme Court

has held that § 971.13(1) codifies the Dusky standard. State v. Garfoot, supra, 207 Wis.2d 215, 226.[1]

The same standard for competency applies at any stage of the proceedings. A higher or more demanding standard is not required for the decision to withdraw a plea of not guilty by reason of mental disease or defect. State v. Byrge, 225 Wis.2d 702, 712, 594 N.W.2d 388 (Ct. App. 1999).

C. Rationale for the competency rule

The rule against trying a person who is not competent is grounded in due process: it violates fundamental fairness to prosecute a defendant who is not able to fully exercise his or her constitutional procedural rights. Further, "a defendant's full assistance and cooperation has been traditionally thought essential to developing the 'true facts' of the case." State ex rel. Matalik v. Schubert, 57 Wis.2d 315, 322, 204 N.W.2d 13 (1973).

D. Competency and related issues

It is often the defendant's courtroom behavior, inability to understand procedures or difficulty in getting along with counsel that first gives reason to doubt competency to proceed. These problems may indicate other issues as well. These related issues are discussed briefly below.

1. Competency and criminal responsibility

Competency to stand trial is concerned with the defendant's mental condition at the time of the trial. Only the mental conditions that affect the ability to understand the proceedings and assist in the defense are at issue.

Criminal responsibility (or the "insanity defense") differs in two important respects. First, it is concerned with the defendant's mental condition at the time of the offense. Second, it is concerned with the effect of that mental condition on the defendant's ability to tell right from wrong or to conform his or her conduct to what the law requires.

A person with serious mental problems may present both competency to proceed and insanity defense issues, only one of them, or neither one. Trial courts should be alert for indications that either issue needs to be pursued and keep in mind the different time frames and abilities that each issue involves.

Courts sometimes order that competency and criminal responsibility evaluations be conducted at the same time or order an inpatient criminal responsibility examination. There is no statutory authority for an inpatient examination of a defendant's criminal

responsibility. Trying to combine that examination with a competency evaluation causes problems for the examiners because there usually is not enough time to conduct both of them.

2. Competency and self-representation

This Special Material is concerned with competency to proceed in cases where the defendant is represented by counsel.[2] Occasionally, the competency of defendants who seek to represent themselves is questioned. Competency to stand trial is not the same as competency to proceed pro se. Pickens v. State, 96 Wis.2d 549, 567, 292 N.W.2d 601 (1980). In State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), the Wisconsin Supreme Court reaffirmed the Pickens rule and reversed a decision of the court of appeals that had held that separate inquiry into "competence for self-representation" was no longer required.

Extensive discussion of waiver of counsel, self-representation, and related issues is beyond the scope of this Special Material. But because these issues often arise in conjunction with competency to stand trial questions, a few considerations relating to the competency inquiry should be emphasized.

First, whether or not the defendant is represented by counsel, the court must determine if there is "reason to doubt" the defendant's competency to proceed. If there is "reason to doubt," the examination procedures set forth in subsecs. (1)-(3) of § 971.14 and outlined in this Special Material should be followed. If the court determines that the defendant is not competent to proceed, a commitment under § 971.14(5) should follow.

Second, if the defendant is found to be competent to proceed and wishes to proceed pro se, the court must determine if the defendant is making a knowing and voluntary waiver of the right to counsel. If the waiver is valid, a further inquiry must be made to determine whether the defendant "possesses the minimal competency necessary to conduct his own defense." Pickens, 96 Wis.2d 549 at 569, reaffirmed in Klessig, 211 Wis.2d 194, 212. For a complete discussion, see SM 30 WAIVER AND FORFEITURE OF COUNSEL; SELF-REPRESENTATION; STANDBY COUNSEL; "HYBRID REPRESENTATION"; COURT APPOINTMENT OF COUNSEL.

3. Competency and amnesia

Amnesia by itself does not mean that a defendant is not competent to stand trial. Questions relating to amnesia may be raised by a request for a competency evaluation and, as to the competency issue, the regular standard applies. A defendant may suffer from amnesia and be competent under this standard. In those cases, Wisconsin courts have adopted a six-part test to determine whether the defendant – competent but claiming

amnesia – can receive a fair trial. See State v. McIntosh, 137 Wis.2d 339, 404 N.W.2d 557 (Ct. App. 1987), and State v. King, 187 Wis.2d 548, 523 N.W.2d 159 (Ct. App. 1994).

4. Chapter 980 sexually violent person commitments

Wis. Stat. section 971.14 once applied to chapter 980 commitments pursuant to Wis. Stat. section 980.05(1m) (2003-04). The previous version of § 980.05(1m) provided: "At the trial to determine whether the person who is the subject of a petition under s. 980.02 is a sexually violent person, all rules of evidence in criminal actions apply. All constitutional rights available to a defendant in a criminal proceeding are available to the person." However, § 980.05(1m) was repealed by 2005 Wis. Act 434, §§ 101, 131(1) [effective August 1, 2006]. Therefore, because competency evaluations under § 971.14 are limited to criminal case defendants, they no longer apply to prisoners against whom a ch. 980 petition has been filed.

The Wisconsin Court of Appeals affirmed this in In Re Commitment of Luttrell, 2008 WI App 93, 312 Wis.2d 695, 754 N.W.2d 249, when it held that a prisoner eligible for commitment under § 980.05(5) did not have a due process right to a competency evaluation under § 971.14. The court concluded that a ch. 980 action is a civil commitment, not a criminal prosecution, thus a prisoner against whom a ch. 980 petition has been filed is not a criminal case defendant. Luttrell, supra, at ¶7. Although a successful ch. 980 petition results in continued confinement, prisoners determined to be sexually violent persons are confined for treatment purposes, not for punishment. Id. at ¶9.

II. When and How Is Competency Raised?

A. May be raised at any time

1. In the trial court

Competency may be raised at any time between the filing of charges and the pronouncement of judgment. While questions about competency are usually raised before trial, it can become an issue after trial but before sentencing. State v. McKnight, 65 Wis.2d 582, 223 N.W.2d 550 (1974).

2. During postconviction proceedings

In State v. Debra A.E., 188 Wis.2d 111, 523 N.W.2d 727 (1994), the Wisconsin Supreme Court addressed the standards and procedures to be used when competency is raised during postconviction proceedings. First, the court noted that the procedures set forth in §§ 971.13 and 971.14 govern competency determinations only through the sentencing stage of a criminal trial and that they do not require circuit courts to rule on

competency during postconviction relief proceedings. 188 Wis.2d 111, 128, n.14. However, when the question of competency is raised in the circuit court at the postconviction stage, the court has the power to consider the question and should use the same "reason to doubt standard" employed under § 971.14. The court may use its discretion to determine how the competency evaluation should be made; if a hearing is held, the court should be guided by § 971.14 to the extent feasible. The standard for the competency decision was described as follows: ". . . a defendant is incompetent to pursue postconviction relief . . . when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." 188 Wis.2d 111, 126.

If the court finds that a defendant is not competent at the postconviction stage, "the court's goal is to fashion a process through which circuit courts and counsel can manage the postconviction relief . . . while protecting defendants' fair opportunity for postconviction relief and promoting the effective administration of the judicial system. . . [O]rdinarily this process need not include a court order for treatment to restore competency. Meaningful postconviction relief can be provided even though a defendant is incompetent." 188 Wis.2d 111, 129 30. The court identified the following alternatives for the court to apply as appropriate:

> (1) continuation of postconviction relief proceedings – defense counsel should initiate or continue postconviction relief on a defendant's behalf when any issues rest on the record, do not necessitate the defendant's assistance or decisionmaking, and involve no risk to the defendant;
>
> (2) continuances or enlargement of time limits for postconviction relief [if issues do necessitate the defendant's assistance or decision making];
>
> (3) appointment of temporary guardians – upon defense counsel's request, to make the decisions the law requires the defendant to make; and
>
> (4) permitting defendants who regain competency to raise issues at a later proceeding that could not have been raised earlier because of incompetency.

188 Wis.2d 111, 133 36.

3. During probation revocation proceedings

In State ex rel. Vanderbeke v. Endicott, 210 Wis.2d 503, 563 N.W.2d 883 (1997), the Wisconsin Supreme Court set forth the procedure to be employed when competency is raised during a probation revocation proceeding.

If an administrative law judge has reason to doubt the probationer's competency, the revocation proceeding is to be stayed until a competency determination can be made. An administrative law judge having reason to doubt a probationer's competency shall promptly forward a written request for a competency determination to the circuit court in the county in which the probationer was sentenced. The request shall be accompanied by a copy of the papers on file in the revocation proceeding and the administrative law judge's written statement explaining the grounds for finding reason to doubt the probationer's competency.

Upon receipt of the written request from an administrative law judge, the circuit court shall determine the probationer's competency. The procedures for determining competency to proceed at trial, set forth in § 971.14, shall be followed to the extent practicable.

4. Retrospective evaluation of a defendant's competency to stand trial

The ability to conduct a retrospective determination of a defendant's competency to stand trial is inherently difficult. However, in State v. Johnson, 133 Wis.2d 207, 225, 395 N.W.2d 176 (1986), the court of appeals determined that "the mere passage of time may not make the effort meaningless" if there is sufficient evidence in the record derived from the trial. By analyzing the applicable legal and medical records, along with a current medical evaluation, the court determined that it was possible to produce "a hindsight picture of Johnson's competency at the time of trial." Id. at 225.

If the circuit court concludes that a meaningful inquiry can be held, it must then hold a competency hearing. If the circuit court finds that a meaningful hearing cannot be held, or if it finds that the accused was incompetent during the trial, then it must vacate the judgment of conviction and order a new trial. Because "retrospective determinations of competency are factual determinations," they will be upheld "unless totally unsupported by facts in the record and, therefore, clearly erroneous." See State v. Smith, 2016 WI 23, ¶30, 367 Wis.2d 483, 878 N.W.2d 135; See also, State v. Byrge, 2000 WI 101, ¶33, 237 Wis.2d 197, 614 N.W.2d 477; State v. Garfoot, 207 Wis.2d 214, 224-25, 558 N.W.2d 626 (1997); Wis. Stat. § 805.17(2).

B. "Reason to doubt" the defendant's competency

Section 971.14(1)(a) requires that a competency inquiry be made "whenever there is reason to doubt a defendant's competency to proceed." Defendants who may be incompetent cannot waive the right to have the court determine their capacity to stand trial. Pate v. Robinson, 383 U.S. 375, 384 (1966).

C. Who may raise the issue?

1. Defense counsel

Defense counsel usually raises the competency issue and may do so either by written motion or orally, on the record, in court. If defense counsel has reason to doubt the defendant's competency, counsel must bring the issue to the trial court's attention. Failure to do so constitutes ineffective assistance of counsel. State v. Johnson, 133 Wis.2d 207, 395 N.W.2d 176 (1986). In Johnson, defense counsel had letters from a psychiatrist and a psychologist expressing serious doubts about the defendant's competency but made the "strategic decision" to withhold the letters from the court. The defendant was convicted, but the conviction was reversed on the ground that counsel's failure to raise the competency issue constituted ineffective assistance of counsel as a matter of law. ". . . [W]here defense counsel has a reason to doubt the competency of his client to stand trial, he must raise the issue with the trial court. The failure to raise the issue of competency makes the counsel's representation fall below an objective standard of reasonableness. . . . We believe that considerations of strategy are inappropriate in mental competency situations. Thus, we hold that strategic considerations do not eliminate defense counsel's duty to request a competency hearing." 133 Wis.2d 207, 220 21.

In State v. Meeks, 2003 WI 104, 263 Wis.2d 794, 666 N.W.2d 859, the Wisconsin Supreme Court held that a lawyer who formerly represented the defendant cannot testify about his or her perceptions of the former client's competency when competency is raised in a new prosecution. [See discussion at Sec. IV., A., below.] The court adopted what is characterized as the minority view on this issue and admitted that it creates a tension with the Johnson decision. The court did not overrule Johnson, pointing out that:

> The attorney is merely obligated to "raise the issue [of competency] with the trial court." Johnson, 133 Wis.2d at 220. There is no requirement that the attorney testify about his or her reasons for raising the issue or the opinions, perceptions, or impressions that form the basis for his or her reason to doubt the client's competence. Id., ¶46.

2. Defendant

Defendants may occasionally try to raise the competency issue themselves, even if defense counsel has not. In these situations, courts may wish to conduct an inquiry to establish whether the defendant's competency is the problem as opposed to difficulty in getting along with defense counsel or simply dissatisfaction with defense counsel.

3. Prosecutor

The prosecutor may also choose to raise the competency issue. In these cases, courts

should be aware that in some instances, criminal charges followed by a prosecutor's raising the defendant's competency to proceed have been used as a substitute for initiating civil commitment proceedings under Chapter 51.

4. Court – sua sponte

Even if competency is not raised by the parties, a court has a duty to make an inquiry into competency whenever the defendant's conduct gives rise to "reason to doubt." Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966).

D. Basis for "reason to doubt" competency

A statement by the defendant or defense counsel to the effect that the defendant cannot understand the proceedings may not be enough to trigger a full competency inquiry and is not sufficient if negated by the defendant's actions, such as preparing motions that show an understanding of the proceedings. State v. McKnight, 65 Wis.2d 582, 223 N.W.2d 550 (1974). The claim should be supported by facts, such as the defendant's demeanor, medical history, the presence of irrational behavior, any prior medical opinions on competency to stand trial, etc. While defense counsel's representations need not be accepted without question, the United States Supreme Court has recognized that doubt expressed by the one with the closest contact with the defendant "is unquestionably a factor which should be considered." Drope v. Missouri, 420 U.S. 162, 177 n.13 (1975). If competency is not raised in open court, the presentation of a written motion (often captioned "Motion To Notice Competency") is an effective method for calling the issue to the court's attention.

In some cases, the "reason to doubt" competency will be obvious. In more difficult cases, it may be necessary to conduct an evidentiary hearing to help the court decide whether the full competency inquiry should be ordered.

In State v. Weber, 146 Wis.2d 817, 433 N.W.2d 583 (Ct. App. 1988), the court reviewed the "reason to doubt" standard in light of four factors: a statement by the defendant's first lawyer that he had "some question" regarding competency; the defendant's demeanor in the courtroom, specifically his silence and responses to certain questions; a civil mental commitment several years earlier; and statements by the defendant's second lawyer at sentencing to the effect that the defendant was under psychiatric care. The court concluded that these factors did not, individually or in combination, establish a "reason to doubt" competency.

E. Probable cause determination

When the court is satisfied that there is reason to doubt the defendant's competency, an examination of the defendant is to be ordered but only after a finding that it is probable

that the defendant committed the offense charged.

1. Unnecessary, if after preliminary examination

If the question about competency arises after the preliminary examination, a further probable cause determination is not required. § 971.14(1)(b).

2. From the complaint, unless the defendant comes forward

If competency is raised before the preliminary examination in a felony case (or at any time before the verdict is returned in a misdemeanor), the court may not order a competency evaluation until satisfied that it is probable that the defendant committed the offense charged.

The probable cause finding may be based solely upon the criminal complaint unless the defendant comes forward with allegations sufficient to justify a hearing. § 971.14(1)(c).

3. Hearing on probable cause

A hearing must be ordered "if the defendant submits an affidavit alleging with particularity that the averments of the complaint are materially false." § 971.14(1)(c). The hearing is limited to the issues and witnesses required for determining probable cause. The defendant may call and cross examine witnesses. The rules of evidence do not apply. § 911.01(4)(c).

Section 971.14(1)(c) allows the receipt of testimony over the telephone at the probable cause hearing: "Upon a showing by the proponent of good cause under § 807.13(2)(c), testimony may be received into the record of the hearing by telephone or live audiovisual means."

If the court finds that probable cause is not established, the charge shall be dismissed without prejudice, and the defendant shall be released (subject to being held in custody or continued on bail for not more than 72 hours pending the issuance of a new complaint – see § 971.31(6)).

If the court finds that probable cause exists, an examination is ordered.

III. The Competency Examination

A. Ordering the examination

1. Appointing examiners

"One or more" examiners are to be appointed; they need not be psychiatrists but must have "the specialized knowledge determined by the court to be appropriate." § 971.14(2)(a). This is a change from prior law, which required that examiners be "physicians."

2. Outpatient examinations preferred

A defendant released on bail may not be ordered to have an inpatient examination unless the defendant fails to cooperate in the examination or the examiner informs the court that inpatient observation is necessary to an adequate examination. § 971.14(2)(b).

If the defendant is not released on bail, outpatient examinations are required unless "an inpatient examination is determined by the court to be necessary." § 971.14(2)(a).

3. Inpatient examinations

If an inpatient examination is found to be necessary, the defendant may be committed to "a suitable mental health facility" for up to 15 days. § 971.14(2)(a) and (c). Orders sometimes call for an examination by a particular person. While the facilities often try to honor those orders, there is not statutory authority for requiring them to do so. The facility may request one 15 day extension if it can show good cause why the examination cannot be completed within the original period. § 971.14(2)(c). The commitment is to a facility.

In the past, it was routine to order that competency evaluations be conducted at the state mental health institutes at Mendota and Winnebago. However, in most cases, evaluations can be conducted more quickly and efficiently at a community location operated under a contract with the Department of Health and Family Services as part of the department's "local sites" project.

The authority of the department to determine where evaluations will take place was clarified by the creation of § 971.14(2)(am):

> Notwithstanding par. (a), if the court orders the defendant to be examined by the department or a department facility, the department shall determine where the examination will be conducted, who will conduct the examination and whether the examination will be conducted on an inpatient or outpatient basis. Any such outpatient examination shall be conducted in a jail or a locked unit of a facility. In any case, under this paragraph in which the department determines that an inpatient examination is necessary, the 15 day period under par. (c) begins upon the arrival of the defendant at the inpatient facility. If an outpatient examination is begun by or through the department, and the department later determines that

an inpatient examination is necessary, the sheriff shall transport the defendant to the inpatient facility designated by the department, unless the defendant has been released on bail.

The court must arrange for the transportation of in custody defendants to the examining facility and back to the jail. § 971.14(2)(d).

Time spent at an inpatient facility for a competency examination is time for which sentence credit is due under § 973.155 if the defendant is eventually convicted and sentenced. § 971.14(2)(a).

4. The commitment order

The commitment order should be executed completely and clearly. (Use of the officially adopted circuit court form is required. See CR 206, available on the state court website: http://www.wicourts.gov/). It should indicate the name of the defense counsel[3] and the prosecutor since examiners often wish to consult with the lawyers in conducting the examination. The examiners also find it helpful if the commitment order is accompanied by documents that provide more information about the defendant and the offense. The criminal complaint should be attached to the certificate in all cases. When available, the following materials are also helpful:

- police reports
- record of previous convictions or arrests
- a presentence report from other recent cases
- any other clinical records the prosecutor may have.

This additional material is especially important for inpatient examinations since they must be completed within 15 days.

5. Examiner's duties

The examiner shall personally observe and examine the defendant and shall have access to treatment records. § 971.14(2)(e). "Treatment records" are defined in § 51.30(1)(b).

6. Medication and treatment during the examination period

Section 971.14(2)(f) provides that a defendant may receive voluntary treatment during the examination period. This "clarifies that a defendant on examination status may receive voluntary treatment but, until committed under sub. (5), may not be involuntarily treated or medicated unless necessary for the safety of the defendant or others. See s. 51.61(1)(f),

(g), (h) and (i)." Judicial Council Committee's Note, 1981. Also see State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 823 (1987), discussed at Sec. IV., G., this Special Material.

7. Examination by other experts

Section 971.14(2)(g) provides that the defendant may be examined at any time by other experts chosen by the defendant or by the prosecution. These experts must be allowed reasonable access to the defendant. The examinations are limited to competency purposes.

B. The examiner's report

The requirements for the report and its contents are specified in § 971.14(3).

1. Time limits for filing

Section 971.14(2)(c) establishes the following time limits:

a. Outpatient examinations: within 30 days of the ordering of the examination.

b. Inpatient examinations: within 15 days of the ordering of the examination (unless an extension has been ordered. In that case, within 30 days).[4]

2. Contents

Section 971.14(3) requires that the report contain the following:

a. Description of the examination.

b. Identification of the persons interviewed, the specific records reviewed, and any tests administered.

c. The clinical findings of the examiner.

d. The examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense, including the facts and reasoning, in reasonable detail, upon which that opinion is based.

e. If the report indicates the defendant lacks competency, the examiner's

opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within 12 months (or the maximum sentence for the most serious offense with which the defendant is charged, whichever is less).

f. If sufficient information is available, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment. [Sub. (3)(dm).]

Section 971.14(3)(e) further requires that the report contain "the facts and reasoning, in reasonable detail" for the findings and opinions set forth in c. through f., above.

3. Filing and distribution

The report is to be filed with the court (§ 971.14(3)), and the "court shall cause copies of the report to be delivered forthwith to the district attorney and defense counsel, or the defendant personally if not represented by counsel." § 971.14(4)(a).

"Upon the request of the sheriff or jailer charged with care and control of the jail in which the defendant is being held . . . , the court shall cause a copy of the report to be delivered to the sheriff or jailer." § 971.14(4)(a), as amended by 2003 Wisconsin Act 122, effective date: February 21, 2004.

The report shall not be otherwise disclosed prior to the hearing on competency. § 971.14(4)(a).

IV. The Judicial Determination Regarding Competency

Competency to stand trial is a legal issue to be decided by the court. A finding is not to be made on the basis of rubber stamping the expert's report. State ex rel. Haskins v. Dodge County Court, 62 Wis.2d 250, 264, 214 N.W.2d 575 (1974). Stated another way, the ultimate legal conclusion of competency to stand trial is a judicial rather than medical determination. State v. Smith, 2016 WI 23, ¶52, 367 Wis.2d 483, 878 N.W.2d 135.

A. Evidentiary hearing on competency

A full evidentiary hearing is not always required since the statutes allow the district attorney, the defendant, and the defense counsel to "waive their respective opportunities to present other evidence on the issue." § 971.14(4)(b). In State v. Guck, 176 Wis.2d 845, 500 N.W.2d 910 (1993), the court held that § 971.14(4)(b) does not require a personal statement by a defendant waiving the evidentiary hearing. In Guck, defense counsel stated in the trial court that he had discussed the report and the right to a hearing with the

defendant and that the defendant wished to waive the hearing. The court concluded that "the Legislature did not intend to require a personal statement by a criminal defendant waiving the opportunity to present evidence on the issue of competency under sec. 971.14(4)(b)." 176 Wis.2d 845, 855.

The decision in Guck makes it clear that the statute does not require a personal statement by the defendant. But the Committee continues to recommend as good practice that the court personally inquire of the defendant whether he or she concurs in the waiver. A simple question at this stage may help to forestall a later, more cumbersome, inquiry into effectiveness of defense counsel.

Section 971.14(4)(b) allows the receipt of testimony over the telephone at the competency hearing: "Upon a showing by the proponent of good cause under § 807.13(2)(c), testimony may be received into the record of the hearing by telephone or live audiovisual means."

In State v. Meeks, 2003 WI 104, 263 Wis.2d 794, 666 N.W.2d 859, the Wisconsin Supreme Court held that a lawyer who formerly represented the defendant cannot testify about his or her perceptions of the former client's competency when competency is raised in a new prosecution. Meeks was charged with felony murder and, his competency to stand trial was raised shortly after initial appearance. The state introduced testimony of an attorney who had represented Meeks on charges in earlier cases but did not represent him on the current charges. The attorney did not testify as to any specific communications with Meeks, but the implication of her testimony was that Meeks was competent to proceed during those earlier cases.

The court of appeals held that the testimony was appropriate because it did not divulge the contents of any specific conversations and therefore did not violate the attorney-client privilege. The Wisconsin Supreme Court reversed, holding that:

> . . . an attorney's opinions, perceptions, and impressions relating to a former client's mental competency fall with the definition of a confidential communication pursuant to Wis. Stat. § 905.03(2) and SCR 20:1.6. As a result, such communications may not be revealed without the consent of the client. 2003 WI 104, ¶2.

The court adopted what is characterized as the minority view on this issue and admitted that it creates a tension with the Johnson decision. The court did not overrule Johnson, pointing out that:

> The attorney is merely obligated to "raise the issue [of competency] with the trial court." Johnson, 133 Wis.2d at 220. There is no requirement that the attorney

> testify about his or her reasons for raising the issue or the opinions, perceptions, or impressions that form the basis for his or her reason to doubt the client's competence. Id., ¶46.

In a final summary, the court restated its conclusion:

> In summary, we hold that the testimony of Scholle violated the attorney-client privilege. While the contents of confidential conversations with Meeks were not revealed in her testimony, Scholle's expressed opinions, perceptions, and impressions of Meeks' competency were premised upon and inextricably linked to confidential communications. Confidential communications must be interpreted to include both verbal and non verbal communications in order to preserve inviolate the integrity of the attorney-client relationship. Id., ¶58.

B. The burden of persuasion

Section 971.14(4)(b) provides as follows with respect to the standard of proof and the allocation of the burden of persuasion on the competency/incompetency issue:

> . . . . At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent. If the defendant stands mute or claims to be incompetent the defendant shall be found to be incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent. If the defendant claims to be competent, the defendant shall be found competent unless the state proves by evidence which is clear and convincing that the defendant is incompetent.

The statute appears to comply with due process requirements for the competency determination and commitment for treatment.[5] However, a possible problem remains if the statute is read literally: if a defendant "claims to be competent," the burden is on the state to prove incompetence "by evidence which is clear and convincing"; if the state fails to meet its burden, the statute provides that "the defendant shall be found competent."

A problem may arise in at least two ways. One is that if the defendant "claims to be competent," the state may well claim the defendant is competent as well, leaving neither party with an interest in presenting the case for either competency or incompetency. A second variation would be presented if the state does attempt to prove incompetency but fails. In either situation, the possible problem is this: failure to prove incompetency by clear and convincing evidence (either because no one pursues that issue or because the standard of proof is not satisfied) does not necessarily mean that competency is established by the greater weight of the evidence.

If it is a basic due process requirement that a person not be tried unless competency is established by at least the greater weight of the evidence, an affirmative finding must be made in every case where there is "reason to doubt" competency. The statute's assertion that "the defendant shall be found competent" in the absence of proof (to a higher degree of certainty) that the defendant is incompetent is no substitute for a finding based on the evidence.

As a practical matter, this should not be a serious problem, but the Committee recommends the cautious approach of making a finding of competency, based on the record, whenever there is "reason to doubt" competency rather than relying on the automatic direction of the statute. In virtually every case, a record failing to show incompetence (by clear and convincing evidence) should support an affirmative finding that the defendant is competent (by the greater weight of the evidence). A recommended finding is included in Sec. E., below.

The approach recommended here is essentially the same as the one called for by the ABA Criminal Justice Mental Health Standards. They call for a finding by the greater weight of the evidence that the defendant is competent. The burden of persuasion is not assigned to either party. If that finding is not made, the court is to consider issues of treatment to effect competence. Involuntary commitment for treatment is to be ordered if the basis therefor is established by clear and convincing evidence. See ABA Criminal Justice Mental Health Standards 7 4.8(c) and 7 4.9(a) (1989).

Finally, it should be noted that section 971.14(4) governs competency determinations only through the sentencing stage of a criminal trial. No other section governs the standard of proof and the allocation of the burden of persuasion on the competency/incompetency issue during a postconviction proceeding. Instead, the burden of persuasion that should be utilized during such proceedings has been created by case law. For a determination of the burden of proof at a postconviction proceeding, see State v. Daniel, 2015 WI 44, 362 Wis.2d 74, 862 N.W.2d 867.

C. If the defendant is found to be incompetent to proceed, the court must determine if regaining competency is likely.

If the court finds that the defendant is not competent to proceed, the court must further determine whether the defendant is likely to become competent within the shorter of the two time periods specified by § 971.14(5)(a):

- within 12 months, or
- within a period equal to the maximum sentence for the most serious offense with which the defendant is charged (if that period is less than 12 months).

In practice, these limits amount to a 12 month limit for Criminal Code felonies because the lowest felony penalty class — Class I — provides for a maximum of 1.5 years imprisonment and 2 years of extended supervision. Most Criminal Code misdemeanors are "Class A" and have a 9 month maximum sentence. There are some Class B and C misdemeanors in the Criminal Code, which have 90 day and 30 day maximum penalties, respectively.

1. Recovery of competency not likely: release

If the court determines that regaining competency within the designated time period is not likely, § 971.14(6)(a) provides that the defendant is to be released, subject to the civil commitment transition provision described in § 971.14(6)(b) and in Sec. VII., B., this Special Material.

2. Recovery of competency likely: commitment

If the court determines that the defendant is likely to become competent within the specified period, the court is to order that the proceedings be suspended and shall commit the defendant to the custody of the department for placement in an appropriate institution. § 971.14(5)(a).

D. The right to refuse medication if the defendant is committed "Sell factors"; involuntary medication orders.

The Wisconsin Supreme Court has held that all involuntarily committed persons have the right to refuse psychotropic medication. State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 883 (1987). This includes persons committed under § 971.14 as not competent to stand trial.

A finding on competence to refuse medication is to be made as part of the initial competency evaluation if sufficient information is available to the examiner. See § 971.14(3)(dm). A similar finding is also to be made at the time the person is committed as not competent to stand trial. See § 971.14(4)(b). If no court order regarding competence to refuse medication was entered at the time of commitment, a procedure for returning to court to obtain such an order is set forth in § 971.14(5)(am).

The standard for determining competence to refuse medication is set forth in § 971.14(3)(dm):

> …The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and, after the advantages and disadvantages of and alternatives to accepting the particular

medication or treatment have been explained to the defendant, one of the following is true:

1. The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.

2. The defendant is substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness, developmental disability, alcoholism, or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

The necessity and extent of advice on the "advantages, disadvantages and alternatives" in a civil commitment case is discussed in In Matter of Mental Condition of K.S., 147 Wis.2d 575, 433 N.W.2d 291 (Ct. App. 1988).

It is important that hearings be held as quickly as possible so that needed treatment is not delayed. It may help to receive testimony pursuant to the rules on conducting proceedings by telephone or audiovisual means. (The statute quoted above refers to the "procedures and standards specified in [§ 971.14] sub. (4)(b)." Subsection (4)(b) includes a provision for taking testimony by telephone.)[8] The hearing may be conducted by a court commissioner. State ex rel. Jones v. Gerhardstein, supra, 141 Wis.2d 710, 746.

Note that at any stage where a person is found not competent to refuse medication, the effect of a court order is to authorize medication or treatment under appropriate medical standards. (See § 971.14(4)(d).) The statute does not give the court authority to order that specific kinds of treatment be offered.

1. Competency restored by medication; involuntary medication orders "Sell factors"

Section 971.14(5)(d) provides:

If the defendant is receiving medication the court may make appropriate orders for the continued administration of the medication in order to maintain the competence of the defendant for the duration of the proceedings.

This provision should be implemented only after consideration of the decisions of the United States Supreme Court in Riggins v. Nevada, 504 U.S. 127 (1992) and Sell v. United States, 539 U.S. 166 (2003), and the Wisconsin Supreme Court in State v. Fitzgerald, 2019 WI 69, 387 Wis.2d 384, 929 N.W.2d 165.

In Riggins, the Court reversed a conviction because the state trial court failed to make

sufficient findings to support the forced administration of antipsychotic drugs during trial. Riggins was charged with murder and robbery. He complained about hearing voices and having trouble sleeping. The drug Mellaril was prescribed, beginning at a level of 100 milligrams per day. It was eventually increased to 800 milligrams per day. Prior to trial, Riggins requested that the trial court order the administration of the drug suspended until after trial. The trial court refused, without an extensive statement of reasons.

The United States Supreme Court held that the involuntary administration of Mellaril denied Riggins "a full and fair trial." The side effects of the drugs could affect Riggins' outward appearance, which is observed by the jury in evaluating the defendant's demeanor. And ". . . it is clearly possible that such side effects impacted . . . the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." 504 U.S. 127, 137. Further, a defendant has a liberty interest in freedom from unwanted antipsychotic drugs. The Court found the record insufficient to support a finding that these interests were outweighed by the need to accomplish an essential state policy, so the conviction was reversed.

The Court elaborated on Riggins in 2003. The Court held:

> . . . the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. 539 U.S. 166, 179.

The Court emphasized that the instances where involuntary medication is permitted may be rare. That is because the standard says or implies the following:

> "First, a court must find that **important** governmental interests are at stake. . .
>
> Second, the court must conclude that involuntary medication will **significantly further** those concomitant state interests. . .
>
> Third, the court must conclude that involuntary medication is **necessary** to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.
>
> Fourth, . . . the court must conclude that administration of the drugs is **medically appropriate**, i.e., in the patient's best medical interest in light of his medical condition."
>
> 539 U.S. 166, 180-181 [emphasis in original]

The question regarding medication for competency purposes was restated as follows:

> Has the government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it? Id., at 183.

In Fitzgerald, the Wisconsin Supreme Court examined the constitutionality of § 971.14 as it related to the issue of ordering involuntary medication to restore a criminal defendant's competency to stand trial. In a unanimous decision, the Court vacated the circuit court's order for involuntary medication, holding that § 971.14 was unconstitutional as applied to Fitzgerald. Therefore, regardless of the language of § 971.14(3)(dm) and (4)(b), the four Sell factors must be satisfied before a court can issue an involuntary medication order to restore competency to stand trial.[6]

Wisconsin Circuit Court form CR-206 Order for Commitment for Treatment (Incompetency) was revised in November of 2019 to accurately reflect the factors set forth in Sell.

These requirements come into play only when medication is believed to be necessary to make the defendant competent to stand trial. This issue need not be considered "if forced medication is warranted for a different purpose, such as the purposes set out in [Washington v.] Harper [494 U.S. 210 (1990)] related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk." Sell 539 U.S. 166 at 185. See also, § 971.14 (2f).

The Committee recommends that § 971.14(5)(d) be interpreted in light of Riggins, Sell, and Fitzgerald to require a specific finding that the need for the ordered medication outweighs the interests of the defendant that the cases identify.

2. Involuntary medication in the context of postconviction proceedings

In State v. Scott, 2018 WI 74, 382 Wis.2d 476, 488, 914 N.W.2d 141, the Wisconsin Supreme Court held that the circuit court acted prematurely when it ordered the defendant be medicated to competency "without first determining whether and to what extent postconviction proceedings could continue despite the defendant's incompetency." Expounding upon this, the Court provided that a circuit court must follow the mandatory procedures established in Debra A.E., before it may order a non-dangerous but incompetent defendant involuntarily medicated for the purpose of conducting a postconviction proceeding. Scott, supra at 482. See also, Debra A.E., 188 Wis.2d 111, 133-36 and section II.2, above.

E. If the court finds the defendant competent, the criminal proceeding shall be resumed.

1. The required finding

If the court finds the defendant competent to proceed, a specific finding should be made. A finding like the following is recommended:

> The court has considered the reports of the examiners, the conduct and demeanor of the defendant, and all the facts and circumstances relating to the defendant's understanding of these proceedings. The court is satisfied by the greater weight of the credible evidence that the defendant does not lack substantial capacity to understand the proceeding or assist in his own defense. The court finds that the defendant is competent to proceed.

F. Commitment as not competent to proceed – § 971.14(5)(a)

1. Basis for commitment

Both of the following bases must exist to support a commitment:

a. The defendant lacks substantial mental capacity to understand the proceedings or assist in his or her own defense; and

b. The defendant is likely to become competent within the commitment period.

2. Length of commitment[7]

The commitment may continue until competency is regained or until the lesser of the following limits is reached:

a. 12 months

The 12-month limit will apply to almost all cases where Criminal Code felonies are charged because the felony class with the shortest penalty, Class I, carries a maximum sentence of 1.5 years confinement and 2 years extended supervision.

b. The maximum sentence for the most serious offense charged

The "maximum sentence" limit will apply only to misdemeanors. Class A misdemeanors carry a 9 month maximum sentence; Class B and C misdemeanors carry 90

day and 30 day maximums, respectively.

3. The commitment order

The commitment order should be executed completely and clearly. (Use of the officially adopted circuit court form is required. See CR 206 (revised November 2019), available on the state court website: http://www.wicourts.gov/.)

G. Suspension of the criminal proceedings

The criminal proceedings are "suspended" during the competency commitment. Pretrial motions under § 971.31 may be decided notwithstanding the defendant's lack of competency if they are "susceptible of fair determination prior to trial and without the personal participation of the defendant." § 971.13(3).

H. Involuntary medication orders automatically stayed pending appeal

In State v. Scott, 2018 WI 74, 382 Wis.2d 476, 914 N.W.2d 141, the Wisconsin Supreme Court held that involuntary medication orders are subject to an automatic stay pending appeal. Citing the United States Supreme Court decision in Sell, the Court concluded that "if involuntary medication orders are not automatically stayed pending appeal, the defendant's 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs' is rendered a nullity. Scott, 2018 WI 74 at ¶44 (quoting Sell, 539 U.S. at 177).

The question of when the automatic stay comes into effect is still an unsettled area of the law. In Fitzgerald, the Wisconsin Supreme Court was evenly divided as to whether the stay begins upon entry of the order, upon filing notice of an appeal, or when the appeal is filed. However, in accordance with Scott, the law is clear that appeals concerning involuntary medication orders are brought as a matter of right pursuant to Wis. Stat. § 808.03(1).

Under Scott, the party seeking a stay of an involuntary medication order pending appeal is automatically entitled to one. However, if the State seeks to lift an automatic stay pending appeal, the merits of the State's motion are governed by the legal standard set forth in State v. Gudenschwager, 191 Wis. 2d 431, 529 N.W.2d 225 (1995), as modified by Court in Scott. Thus, in order to lift an automatic stay of an involuntary medication order pending appeal, the State must:

(1) make a strong showing that it is likely to succeed on the merits of the appeal;

(2) show that the defendant will not suffer irreparable harm if the stay is lifted;

(3) show that no substantial harm will come to other interested parties if the stay is lifted; and

(4) show that lifting the stay will do no harm to the public interest. Scott, 2018 WI 74 at ¶47.

V. Reexamination and Reports

A. Timing of the reports

The treatment facility is required to reexamine the defendant and report to the court at specified intervals. Written reports are to be furnished to court three months after commitment, six months after commitment, nine months after commitment, and within 30 days of the expiration of the commitment. § 971.14(5)(b).

B. Contents of the reports – § 971.14(5)(b)

Each report shall indicate one of the following:

1. The defendant has become competent; or

2. The defendant remains incompetent but is likely to attain competency within the remaining commitment period; or

3. The defendant has not made such progress that attainment of competency is likely within the remaining commitment period. A report making this indication must include the examiner's opinion regarding whether the defendant is mentally ill, alcoholic, drug dependent, developmentally disabled, or infirm because of aging or other like incapacities.

C. Reexamination hearing

Upon receiving the report, the court shall hold a hearing. The hearing is subject to the same requirements as the original commitment hearing – see § 971.14(4) and section IV., above. The parties may waive the hearing, in which case the finding is to be based on the report.

If the court determines the defendant is competent, the criminal proceeding shall be resumed. If the court determines the defendant is making sufficient progress toward becoming competent, the commitment shall continue. § 971.14(5)(c)).

VI. The Defendant Who Regains Competency

A. Competency regained

If the court determines that the defendant has become competent, the defendant is to be discharged from the commitment, and the criminal proceedings are resumed. § 971.14(5)(c).

B. Competency dependent on medication

If medication has assisted the defendant in regaining competency, the court "may make appropriate orders for the continued administration of the medication in order to maintain the competence of the defendant for the duration of the proceedings." § 971.14(5)(d). But see the discussion at Sec. IV., C., 2. regarding competency restored by medication.

C. Recommitment

If a defendant who has been restored to competency thereafter again becomes incompetent, there may be a recommitment. § 971.14(5)(d). The court must make the same determinations as those required for an original commitment: not competent but likely to become competent within the commitment period.

The maximum period for a recommitment is 18 months, minus the days spent under previous commitments, or 12 months, whichever is less. § 971.14(5)(d).

D. Sentence credit

Sentence credit under § 973.155 is due for all days spent in commitment as not competent to proceed. § 971.14(5)(a). Sentence credit is also required for all days spent during a commitment to an inpatient facility for examination relating to competency to proceed. § 971.14(5)(a).

VII. Competency Not Regained: Discharge from the Commitment

A. Releasing the defendant

If the court determines that it is unlikely that an incompetent defendant will become competent within the remaining commitment period, it shall discharge the defendant from the commitment and release him, subject to the provisions relating to transition and civil commitment. § 971.14(6)(a). (Transition to civil commitment is discussed at Sec. B., below.)

1. Periodic return to court

If a defendant is released, the court may order the defendant to appear in court at specified intervals for redetermination of competency to proceed. § 971.14(6)(a).

2. Reexamination of competency

"Counsel who have received notice under par. (c) [from custodian of incompetent defendant who was civilly committed] or who otherwise obtain information that a defendant discharged under par. (a) [discharge and release] may have become competent may move the court to order that the defendant undergo a competency examination. . . ." § 971.14(6)(d).

This competency examination is to be conducted under § 971.14(2), the same statute that applies to an original examination. The court may order a report under § 971.14(3) and a hearing under § 971.14(4).

If the court determines that the defendant is competent, the criminal proceeding is resumed.

If the court determines that the defendant is not competent, it shall release the defendant. However, the court "may impose such reasonable nonmonetary conditions as will protect the public and enable the court and district attorney to discover whether the person subsequently becomes competent." § 971.14(6)(d).

3. Status of the criminal charges

The above procedures clearly imply that the criminal charges will remain pending. There is no authority for a trial judge to order dismissal sua sponte. State ex rel. Haskins v. Dodge County Court, 62 Wis.2d 250, 268, 214 N.W.2d 575 (1974). Dismissal of charges is apparently within the prosecutor's discretion, subject to the general rules relating to speedy trial. Haskins at 267 71.

B. Transition to civil commitment

One of the purposes of the changes made by § 917.14(6), was to facilitate the transition to civil commitment for persons who had been discharged from a competency commitment.[8]

1. Detention – § 971.14(6)(b)

When a defendant is discharged from a competency commitment, the court may order

that he be taken into custody and delivered to one of the following facilities:

a. A facility specified in § 51.15(2) (facilities for the emergency detention of persons undergoing civil mental commitment).

b. An approved public treatment facility under § 51.45(2)(c) (an alcohol treatment facility).

c. An appropriate medical or protective placement facility.

The length of the detention is governed by the statutes relating to the parallel civil commitments: § 51.20 for civil mental commitment; § 51.45(11) for commitments for alcohol treatment; and § 55.06(11) for protective placements.

2. Commitment "statement"

Either the district attorney or the corporation counsel may prepare the "statement" for commitment. § 971.14(6)(b). It is to be based on the allegations of the criminal complaint and the evidence in the case. The statement must meet the requirements for the related civil petitions: § 51.20(1) for civil mental commitments; § 51.45(13)(a) for alcohol treatment; and § 55.06(11) for protective placements. It need not be corroborated by others and will be treated as the petition for commitment. All conduct "during or subsequent to the time of the offense" may be considered in deciding whether the "recent overt acts" requirement for civil commitment has been satisfied. See § 51.20(1)(am).

3. Filing the statement

The statement for commitment shall be given to the director of the facility to which the defendant was delivered. It shall be "filed with the branch of circuit court assigned to exercise criminal jurisdiction in the county in which the criminal charges are pending." § 971.14(6)(b). However, the court may transfer the matter to the branch assigned jurisdiction under Chapter 51.

4. If a person is committed

A person committed under this procedure is treated as though committed under § 51.20, § 51.45, or § 55.06, as applicable. Days spent subject to this commitment do not require sentence credit under § 973.155. § 971.14(6)(b).

5. Notice of transfer or discharge

At least 14 days prior to transfer, discharge, or expiration of the commitment order,

the § 51.42 or § 51.437 board must notify the court which originally discharged the person from the competency commitment, the district attorney for the county in which that court is located, and the person's attorney of record. § 971.14(6)(c).

6. Subsequent competency examinations

Upon receiving the above notice or upon receiving other information that the defendant is competent to proceed, either the district attorney or defense counsel may move the court to order another competency examination under § 971.14(2). The procedures relating to the original evaluation of competency apply. § 971.14(6)(d).

If the court determines that the defendant is competent, the criminal proceedings shall be resumed. If the court determines that the defendant is not competent, it shall order release but may impose such reasonable nonmonetary conditions as will protect the public and enable the court and district attorney to discover whether the person subsequently becomes competent. § 971.14(6)(d).

COMMENT

SM 50 was originally published in 1974 and revised in 1986, 1988, 1989, 1991, 1997, and 2004. This revision was approved by the Committee in August 2021.

This Special Material is intended to outline the statutory procedures relating to determining a defendant's competency to stand trial.

The 2004 revision withdrew three appendices. Appendix A was a letter describing the "local sites" project of the Department of Health and Family Services, which is intended to provide faster and less expensive competency evaluations. Trial courts generally receive periodic updates on the local sites assigned to their courts. Appendix B illustrated a completed order for competency evaluation. Appendix C illustrated a completed order for commitment for treatment. The forms for these orders are available on the state court website. See CR 205 and CR 206 at http://www.wicourts.gov/.

The competency procedures set forth in § 971.14 apply to persons facing commitment as sexually violent persons under Chapter 980. State v. Smith, 229 Wis.2d 720, 600 N.W.2d 258 (Ct. App. 1999).

1. This basic standard for competency is sometimes elaborated upon by reference to more specific abilities and characteristics. In State v. Garfoot, the court noted that "[t]o elicit information about a defendant's competence, many courts and experts rely on a 13 point checklist known as the 'McGarry Scale' or 'Competency to Stand Trial Instrument,'" and made reference to State v. Shields, 593 A.2d 986 (Del. Super. 1990), which in turn refers to a detailed list of factors. 207 Wis.2d 215, 228, n.7.

2. It is assumed that a person committed for a competency examination will always be represented by counsel or will have waived counsel. A person must at least be afforded the opportunity to be represented, not only because it is constitutionally required (the criminal prosecution has begun) but also because medical ethics preclude conducting a competency examination of any person charged with crime "prior to access to or availability of legal counsel." American Psychiatric Association Ethical Guidelines, Section

4, Number 13.

3. Examiners are ethically prohibited from examining a person charged with a crime who has not had access to counsel. See note 2, supra.

4. The 15 day limit under § 971.14(2)(am) does not begin to run until the defendant arrives at the examination facility; the limit did not apply where the court's order was not reduced to writing, and the defendant was never transported to the examination facility. State ex rel. Hager v. Marten, 226 Wis.2d 687, 594 N.W.2d 791 (1999).

5. Subsection (4) of § 971.14 contains two different burdens of persuasion, depending on what the defendant claims with regard to competency. This possibly awkward approach was adopted in an attempt to serve two different interests. The statute requires the state to prove competency by the greater weight of the evidence to serve the basic due process requirement that an incompetent defendant may not be tried. The statute requires the state to prove incompetency by clear and convincing evidence to justify the involuntary commitment for treatment of the defendant who is found to lack competency. This approach was developed in an attempt to meet requirements that were believed to follow from the analogy made between involuntary civil mental commitments and commitments of those found not competent to stand trial. The United States Supreme Court has addressed some aspects of this issue since § 971.14 was adopted in its present form.

In Medina v. California, 505 U.S. 437, 439 (1972), the Court held that "the Due Process Clause permits a State to require a defendant who alleges incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence." In Cooper v. Oklahoma, 517 U.S. 348 (1996), the Court held that an Oklahoma statute requiring the defendant to prove lack of competency by clear and convincing evidence violated the Due Process Clause. And, in Addington v. Texas, 441 U.S. 418 (1979), the Court held that the "clear and convincing evidence" burden satisfies the requirements of due process for the purposes of civil mental commitment. The Wisconsin two-step approach clearly complies with these due process-based requirements.

The constitutionality of the Wisconsin statutory scheme regarding the burden of persuasion was upheld in State v. Wanta, 224 Wis.2d 679, 592 N.W.2d 645 (Ct. App. 1999).

6. Subsections (3)(dm) and (4)(b) are less comprehensive than the standard articulated in Sell in four ways:

First, sub. (3)(dm) "does not require the circuit court to find that an important government 'interest in bringing to trial an individual accused of a serious crime' is at stake," as required by the first Sell factor. Fitzgerald, supra at ¶26. Instead, § 971.14 "merely requires the circuit court to find probable cause that the defendant committed a crime—not necessarily a serious one." Id. at ¶26. See also, § 971.14(1r).

Second, sub. (3)(dm) fails to consider the second Sell factor, as "it does not require the circuit court to conclude that medication is substantially likely to restore a defendant's competency or to consider whether side effects 'will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense.'" Fitzgerald, at ¶27 (quoting Sell, 539 U.S. at 181, 123 S.Ct. 2174 (2003)).

Third, in contrast to the third Sell standard, "§ 971.14(4)(b) mandates involuntary medication if the State establishes pursuant to paragraph (3)(dm) the defendant's inability to either express an understanding of the advantages and disadvantages of medication or to make an informed choice about it, regardless of the existence of less intrusive but nonetheless effective options." ¶28.

Fourth, in contrast to the fourth Sell factor, which requires the circuit court to conclude that the administration of medication is medically appropriate, § 971.14(4)(b) can be read to authorize "whoever administers the medication or treatment to the defendant" to "observe appropriate medical standards." § 971.14(4)(b). See State v. Fitzgerald, 2019 WI 69, ¶¶14-17, 387 Wis.2d 384, 929 N.W.2d 165.

7. Under pre Truth In Sentencing law, good time credit is to be accorded persons committed as incompetent to stand trial. State v. Moore, 167 Wis.2d 491, 481 N.W.2d 633 (1992).

8. For a case illustrating the transition from a competency commitment to a civil mental commitment, see In Re the Mental Condition of Billy Jo W., 182 Wis.2d 616, 514 N.W.2d 707 (1994). In that case, the court held that in certain circumstances, a court may order the release of civil commitment records where there is a "significant interrelationship between criminal proceedings involving a violent felony and the civil commitment." 182 Wis.2d 616, 649. Upon making a threshold determination that the interrelationship exists, the court must balance the public interest in access against the individual's privacy interest.